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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

SCHERCK, RICHTER COMPANY, a Corporation,
Petitioner,

vs.

THOMAS N. DYSART and FREDERICK W. STRAUS, as Members of the Central Properties First Mortgage Bondholders' Committee, and AMBASSADOR BUILDING CORPORATION, a Corporation,
Respondents.

No. 930

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals
for the Eighth Circuit
and

SUPPORTING BRIEF.

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IN THE

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PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit.

MAY IT PLEASE THE COURT:

The petition of Scherck, Richter Company, a corporation, respectfully shows to this Honorable Court:

I.

SUMMARY STATEMENT OF MATTER INVOLVED.

Your petitioner seeks to review the decision of the Circuit Court of Appeals for the Eighth Circuit rendered on November 17, 1941 (R. 211-222), and in which a petition for rehearing was overruled on December 5, 1941 (R. 233), wherein the Court of Appeals affirmed a decree of the Dis-

trict Court, entered February 4, 1941 (R. 84), approving a plan submitted by the Central Properties First Mortgage Bondholders' Committee for the disposal of assets, and disapproving an alternative plan submitted by the petitioner for the disposal of these assets.

The opinion of the Circuit Court of Appeals is reported at 123 F. (2d) 364.

The decree in the District Court was entered after a hearing on a report and a petition filed on September 23, 1940, by the respondents, Thomas N. Dysart and Frederick W. Straus, as members of the Central Properties First Mortgage Bondholders' Committee (R. 28). The plan submitted by the Committee was embodied in the contract dated July 26, 1940, entered into between the Committee and the Ambassador Building Corporation, and was appended to the report and petition (R. 31). The District Court entered an order setting the matter down for hearing and directing the Bondholders' Committee to mail notices of the hearing together with copies of their report to the holders of certificates of deposit (R. 42-44).

The petitioner, as a holder of certificates of deposit of the face value of $11,400.00, filed objections to the plan and submitted an alternative plan (R. 61). Another certificate holder, Julia A. Healy, filed objections to the plan (R. 55). No other certificate holders appeared at the hearing. The Court approved the plan of the Bondholders' Committee as fair and equitable and disapproved the petitioner's plan (R. 78-85).

The proceedings which led up to the decree are characterized by the Court of Appeals in its opinion "as supplemental to and in aid of an equitable reorganization proceeding, the history of which will be found set out in great detail in the opinion of Judge Stone, speaking for this Court in Warner Brothers Pictures, Inc., v. Lawton-Byrne-Bruner Insurance Agency, 79 F. (2d) 804" (R. 211-212).

That case, decided October 31, 1935, confirmed a plan of reorganization herein referred to as the original plan, which was approved by the District Court by its decree of July 5, 1934, and this original plan, while not involved in these proceedings, is the background for the supplemental plan involved in this case. The supplemental plan, often referred to in the record as a plan of disposal, is in essence a plan of reorganization.

The respondent, Ambassador Building Corporation, is the corporation which was organized under the original plan of reorganization and thereby acquired a large office and theater building at Seventh and Locust streets in St. Louis, Missouri, and issued the new securities under the original plan (R. 30).

Under the original plan the holders of certificates of deposit for the First Mortgage Bonds received income bonds of the Ambassador Building Corporation in the face amount of the bonds and also voting trust certificates representing 65 per cent of the stock in the company. Voting trust certificates for 25 per cent of the stock were allotted to second mortgage bondholders and 10 per cent was reserved for management (R. 219). The voting trust continues until 1953. The respondent, Thomas N. Dysart, is Chairman of the Bondholders' Committee, is a voting trustee and is President of the Ambassador Building Corporation, and is also President of the St. Louis Amusement Company. The only other active member of the Committee is the respondent, Frederick W. Straus, connected with S. W. Straus and Sons, the investment house which brought out the securities. One member of the Committee has resigned and another has become incapacitated by reason of illness (R. 121-122).

The assets dealt with in the supplemental plan did not pass under the original plan of reorganization. These assets, hereinafter described, were recovered by the Bond-

holders' Committee for the holders of certificates of deposit by reason of a claim against Skouras Brothers Enterprises, Inc., which had guaranteed the first mortgage bonds. This claim had not been realized upon at the time of the confirmation of the original plan of reorganization and it was provided in the original plan (R. 80) that in the event that the Committee should recover any amounts on this guaranty by Skouras Brothers Enterprises, Inc., then "the amount so recovered shall be distributed pro rata to the holders of certificates of deposit evidencing deposited first mortgage bonds."

In the decree of the District Court confirming the original plan of reorganization the District Court had reserved jurisdiction "for the purpose of supervising the carrying out of said plan of reorganization and determining that securities have been distributed pursuant to said plan of reorganization to the persons entitled thereto." These provisions set out in the decree (R. 80) are the only basis for the jurisdiction of the District Court in entering the decree approving the supplemental plan.

The assets dealt with by the supplemental plan were acquired by the Bondholders' Committee on November 4, 1936, and the realization was reported to the Court in a report filed by the Bondholders' Committee on May 25, 1937 (R. 9). No plan for distribution of the assets or for sale, disposal or reorganization was submitted to the Court until September 23, 1940.

As stated by the Circuit Court of Appeals in its opinion the assets dealt with in the supplemental plan belong exclusively to the holders of certificates of deposit (R. 220). The outstanding certificates aggregate $3,468,200. By reason of the lapse of time and the extensive trading in the new securities issued under the original plan of reorganization the holders of the certificates of deposit as a class can no longer be identified with the security holders of the

Ambassador Building Corporation. Certificate holders, including the petitioner, representing in the aggregate 30 per cent of the total amount outstanding have sold their income bonds and voting trust certificates received in the original plan of reorganization. These certificate holders who have sold their bonds are no longer interested in the Ambassador Building Corporation, but nevertheless do retain their pro rata interest in the assets held by the Bondholders' Committee and conversely the purchasers of these new securities do not step into the shoes of the holders of the certificates of deposit and have no rights or interest in these assets held by the Committee. Neither does the Ambassador Building Corporation nor the 35 per cent interest allotted to persons other than First Mortgage Bondholders have any interest in these assets (R. 117-127).

The assets dealt with by the supplemental plan are detailed in the opinion of the Circuit Court of Appeals (R. 213) and are here summarized as of the date of the contract with the Ambassador Building Corporation of July 26, 1940. These assets are:

1. 52% of the outstanding stock of the St. Louis Amusement Company.
2. $41,000.00 par value of First Mortgage Notes of West End Lyric Theatre, worth par.
3. $51,000.00 of second mortgage notes from St. Louis Amusement Company, worth par.
4. $8,000.00 in cash.
5. Miscellaneous assets of no considerable value.

The St. Louis Amusement Company operates twenty-six motion picture theatres in the St. Louis District, some of which it owns in fee and others which it holds under leaseholds (R. 90-97). As of the date of hearing the net worth of the company was $663,472.95, and the fifty-two per cent interest had a book value of $344,850.00 (R. 96). This represents a valuation of $9.90 per $100.00 of bonds of the

outstanding certificates of deposit amounting to $3,468,-200.00.

The fifty-two per cent interest in the St. Louis Amusement Company is subject to a ten-year option granted to Fanchon & Marco Enterprises, Inc., on July 30, 1936 (R. 34). The details of the option agreement need not be considered and the transfer of the St. Louis Amusement Company stock to the new corporation under the plan is subject to this option.

The plan of the Bondholders' Committee approved by the decree is summarized in the opinion of the Court of Appeals (R. 213-215). Essentials of the plan may be simplified as follows:

1. A new corporation is organized by the Committee with an authorized issue of preferred shares and common shares. The preferred shares are a $12.00 non-income liquidating stock without voting rights, the voting rights being exclusively in the common stock.

2. The Bondholders' Committee transfers to the new corporation the fifty-two per cent stock interest in the St. Louis Amusement Company subject to the option to Fanchon and Marco Enterprises, and the miscellaneous assets (not including, however, the $92,000.00 in mortgages and the $8,000.00 in cash) for which it receives all of the authorized stock of the new corporation, preferred and common.

3. The Bondholders' Committee distributes to the holders of certificates of deposit one share of preferred stock for each $100.00 par amount of bonds represented by the certificates of deposit.

4. The Bondholders' Committee transfers to the Ambassador Building Corporation all of the common stock of the new corporation and the mortgages held by the Committee of the par and actual value of $92,000.00 for all of which the Ambassador Building Corporation pays the Committee $57,000.00 by canceling the Committee's indebtedness to it in the amount

of $35,000.00, and by furnishing the Committee with $22,000.00 to pay the compensation and expenses of the Committee and its counsel. The Ambassador Building Corporation also agrees to hold the Committee harmless from any liability incurred under the plan and offers to buy at $8.00 per share the preferred stock issued to certificate holders who sold their bonds in the Ambassador Building Corporation prior to May 1, 1940.

The factual basis underlying the contention of the petitioner that the plan of the Bondholders' Committee is inequitable is summarized by the Court of Appeals as follows (R. 219):

> 1. The holders of the certificates of deposit in fact own the 52 per cent of the stock in the St. Louis Amusement Company and no others have any beneficial interest therein.
>
> 2. The Ambassador Building Corporation, which will receive the common stock in the new corporation, cannot be identified with the holders of certificates of deposit because about 30 per cent of the new bonds issued by that corporation are held by persons who have bought the bonds since the original plan was consummated, and who have no claim to the 52 per cent in the St. Louis Amusement Company.
>
> 3. Of the stock authorized and issued under the original plan of reorganization 25 per cent was allotted to second mortgage bondholders and 10 per cent to the management, and these interests have no claim to the 52 per cent of the stock in the St. Louis Amusement Company.

Advantages from the Committee's plan would be derived by those who have no interests in the assets dealt with.

> 1. Control of the St. Louis Amusement Company will pass to the voting trustees of the Ambassador

Building Corporation who under the agreement function until 1953.

2. Holders of income bonds of the Ambassador Building Corporation in the amount of approximately $1,000,000.00, representing 30 per cent of the outstanding bonds, will share equally with those who are holders of certificates of deposit and all the benefits and advantages derived from the ownership of the common stock in the Ambassador Investment Corporation.

3. Subject only to the superior rights of the income bondholders and the holders of voting trust certificates the 35 per cent of the stock of the Ambassador Building Corporation allotted to second mortgage bondholders and its management will participate in the benefits and advantages derived from the ownership of the common stock in the Ambassador Investment corporation.

The alternative plan submitted by the petitioner, referred to in the record as the Scherck, Richter plan, is summarized by the Court of Appeals in its opinion (R. 217-219). We here summarize only what we consider the obvious advantages to the cerificate holders of that plan over the plan of the Bondholders' Committee.

1. The new corporation will own not only the 52 per cent of the stock in the St. Louis Amusement Company, but also 42 per cent of the stock contributed by Fanchon and Marco Enterprises, and will thus have the earning power of 96 per cent of the stock.

2. Fanchon and Marco Enterprises will take a subordinate preferred stock for its 42 per cent interest in the St. Louis Amusement Company, on the same basis as used in the allotment of first preferred stock to the certificate holders.

3. Scherck, Richter Company will contribute $100,020.00 in cash by purchasing second preferred stock on the basis of $15.00 per share.

4. The certificate holders will receive instead of the $12.00 nondividend liquidating preferred stock, as provided in the plan of the Bondholders' Committee, a $15.00 preferred stock with prior rights to dividends at the rate of 5 per cent per annum, and with prior rights to all stock in liquidation.

5. For the subordinate position taken by Scherck, Richter Company and Fanchon and Marco Enterprises for the new capital contributed they will receive the common stock carrying the voting rights in the corporation.

II.

JURISDICTION.

1. The judgment of the Circuit Court of Appeals for the Eighth Circuit to be reviewed was rendered on November 17, 1941 (R. 222), and the petition for rehearing filed by the petitioner in that Court was overruled on December 5, 1941 (R. 233).

2. The statutory provisions which are believed to sustain the jurisdiction of this Court are:

> Judicial Code, Section 240 (a), as amended by the Act of February 13, 1925, 28 U. S. C. A., Section 347 (a), 28 U. S. C. A., Section 350.

3. The judgment of the Circuit Court of Appeals is a final decree in equitable proceedings for reorganization which may be reviewed by this Court in the exercise of its discretionary powers. It is believed the decree departs from the controlling principles announced by this Court in equity and bankruptcy reorganizations and the reasons for the exercise of the discretionary power of this Court to grant the writ of certiorari are stated under Point IV, "Reasons for Allowance of Writ."

III.

THE QUESTIONS PRESENTED.

1. May a plan be declared fair and equitable and within the absolute priority rule of the Boyd case, which permits a Bondholders' Committee to transfer assets belonging absolutely to the depositing bondholders to a new corporation, gives to the bondholders preferred stock in the new corporation, and gives to another corporation without real consideration the common stock of the corporation acquiring these assets?

2. May such a plan be sustained as involving the determination of a matter of business policy by reason of the fact that 70 per cent of the depositing bondholders are also bondholders of the corporation which acquires the common stock in the new corporation to which the assets of the depositing bondholders are to be transferred?

3. May such a plan be sustained as fair and equitable when another plan is submitted to the Court by a depositing bondholder which is free of the alleged inequities of the plan of the Bondholders' Committee and which gives to the depositing bondholders a better and more valuable security position?

4. May a court of equity in approving a plan submitted by the Bondholders' Committee as having resulted from arm's length negotiations disregard the fact that the chief sponsor of the plan occupies a position of conflicting loyalties, in that he is chairman of the Bondholders' Committee and also a voting trustee and president of the corporation to which is given without consideration the common stock and complete voting control of the new corporation which will acquire the assets belonging to the depositing bondholders?

IV.

REASONS FOR ALLOWANCE OF WRIT.

1. The decision of the United States Circuit Court of Appeals in holding that the plan submitted by the Bondholders' Committee for the disposition of the assets owned by the depositing bondholders is fair and equitable is directly contrary to and in conflict with the absolute priority rule announced in following applicable decisions of the Supreme Court of the United States:

Northern Pacific Railway Company v. Boyd, 228 U. S. 482;
Kansas City Terminal Ry. Co. v. Central Union Trust Company, 271 U. S. 445;
Case v. Los Angeles Lumber Products Company, 308 U. S. 106;
Consolidated Rock Products Company v. Du Bois, 312 U. S. 510.

2. The decision of the United States Circuit Court of Appeals in holding that the approval by the District Court of the plan submitted by the Bondholders' Committee and its disapproval of the plan submitted by the petitioner presented "a question of business policy calling for the exercise of business judgment" and was within the discretionary power of the District Court is in conflict with the following decisions of the Supreme Court of the United States:

National Surety Company v. Coriell, 289 U. S. 426;
First National Bank v. Flershem, 290 U. S. 504;
Case v. Los Angeles Lumber Products Company, 308 U. S. 106;
Consolidated Rock Products Company v. Du Bois, 312 U. S. 510.

3. The decision of the United States Circuit Court of Appeals in holding that the dual position occupied by

Thomas N. Dysart, chairman of the Bondholders' Committee and chief sponsor of the plan, and his conflicting loyalties may be disregarded as not material considerations in the determination of the fairness and equity of the plan, is in conflict with the following applicable decisions of the Supreme Court of the United States:

American United Mutual Life Insurance Company v. City of Avon Park, 311 U. S. 138;
Woods v. City National Bank and Trust Company, 312 U. S. 262.

V.

PRAYER FOR WRIT.

Wherefore, your petitioner, Scherck, Richter Company, prays that a writ of certiorari be issued to review the judgment (R. 222) entered on November 17, 1941, in the United States Circuit Court of Appeals for the Eighth Circuit in the above-entitled cause.

Respectfully submitted,

SCHERCK, RICHTER COMPANY,
Petitioner,

By LYLE M. ALLEN,
B. L. LIBERMAN,
Its Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINION BELOW.

The opinion in the Circuit Court of Appeals for the Eighth Circuit (R. 212-226) was filed November 17, 1941, and is reported in 123 F. (2d) 364.

The petition for rehearing (R. 228-236) was filed by the petitioner on December 2, 1941, and was by the Court overruled on December 5, 1941 (R. 237).

An order was issued by the Circuit Court of Appeals on December 15, 1941, staying the issuance of the mandate for a period of sixty days from and after said date, pending the filing of a petition to the Supreme Court of the United States for a writ of certiorari (R. 239).

II.

JURISDICTION.

1. The judgment of the Circuit Court of Appeals for the Eighth Circuit to be reviewed was rendered on November 17, 1941 (R. 227), and the petition for rehearing filed by the petitioner in that Court was overruled on December 5, 1941 (R. 237).

2. The statutory provisions which are believed to sustain the jurisdiction of this Court are:

> Judicial Code, Section 240 (a), as amended by the Act of February 13, 1925, 28 U. S. C. A., Section 347 (a), 28 U. S. C. A., Section 350.

3. The facts and rulings involved herein which are believed to bring this case within the jurisdiction relied upon and our reasons for the allowance of the writ are as follows:

a. The decision of the Circuit Court of Appeals in holding that the plan submitted by the Bondholders' Committee for the disposition of the assets owned by the depositing bondholders is fair and equitable is directly contrary to and in conflict with the following applicable decisions of the Supreme Court of the United States:

Northern Pacific Railway Company v. Boyd, 228 U. S. 482;
Kansas City Terminal Ry. Co. v. Central Trust Company, 271 U. S. 445;
Case v. Los Angeles Lumber Products Company, 308 U. S. 106;
Consolidated Rock Products Company v. Du Bois, 312 U. S. 512.

b. The decision of the Circuit Court of Appeals in holding that the approval by the District Court of the plan submitted by the Bondholders' Committee and its disapproval of the plan submitted by the petitioner presented "a question of business policy calling for the exercise of business judgment" and was within the discretionary power of the District Court is in conflict with the following decisions of the Supreme Court of the United States:

National Surety Company v. Coriell, 289 U. S. 426;
First National Bank v. Flershem, 290 U. S. 504;
Case v. Los Angeles Lumber Products Company, 308 U. S. 106;
Consolidated Rock Products Company v. Du Bois, 312 U. S. 510.

c. The decision of the Circuit Court of Appeals in holding that the dual position occupied by Thomas N. Dysart, chairman of the Bondholders' Committee and chief sponsor of the plan and his conflicting loyalties may be disregarded as not being material considerations in the determination of the fairness and equity of the plan, is in con-

flict with the following applicable decisions of the Supreme Court of the United States:

American United Mutual Life Insurance Company v. City of Avon Park, 311 U. S. 138;
Woods v. City National Bank and Trust Company, 312 U. S. 262.

III.

STATEMENT OF THE CASE.

The preceding petition under Subdivision I contains a "summary statement of matter involved" and the same is hereby adopted and made a part of this brief.

IV.

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals erred in holding that the plan of the Bondholders' Committee was fair and equitable (R. 221).

2. The Circuit Court of Appeals erred in holding that the District Court, in approving the plan of the Bondholders' Committee and rejecting the plan of Scherck, Richter & Company, was determining a question of business policy calling for the exercise of business judgment (R. 221).

3. The Circuit Court of Appeals erred in holding that in reviewing the judgment of the District Court approving the plan it could leave out of consideration the fact that Thomas N. Dysart, who was Chairman of the Bondholders' Committee and President and voting trustee of the corporation, occupied a dual and antagonistic position of conflicting loyalties (R. 221).

V.

ARGUMENT.

A.

The plan of the Bondholders' Committee was unfair and inequitable because under it valuable rights and interests in assets owned exclusively by the holders of the certificates of deposit are gratuitously given to persons and interests who have no rights in or claim to these assets.

The plan of the Bondholders' Committee takes away from the holders of certificates of deposit the shares of stock representing a 52 per cent interest in the St. Louis Amusement Company and transfers them to the proposed new corporation, Ambassador Investment Corporation, and the holders of certificates of deposit are then given a $12.00 nonincome liquidating preferred stock in the new corporation which has no voting rights. The common stock is given to the Ambassador Building Corporation without any consideration paid therefor by it. In fact, the Ambassador Building Corporation is receiving from the Bondholders' Committee mortgages having a conceded per cash value of $92,000.00, for which it pays the Committee $57,000.00, thus realizing at the expense of the certificate holders a profit of $34,000.00 (R. 90). The plan and the proposed Articles of Incorporation under the new company show conclusively that the only assets which are to be contributed to the new corporation for all of the stock, preferred and common, are these same shares representing the 52 per cent interest in the St. Louis Amusement Company (R. 31-34).

But these assets belong absolutely and exclusively to the holders of the certificates of deposit (R. 123). They have more than a lien or first claim on the assets; they are the absolute and exclusive owners. There are no subordinate rights in or claims to these assets such as we often have

in reorganizations, which can possibly call for any recognition whatever.

The Ambassador Building Corporation, which will receive the common stock in the new corporation, cannot be identified with the holders of the certificates of deposit because it is undisputed that 30 per cent of the new income bonds in that corporation is held by persons who have bought the bonds since the original plan was consummated and who admittedly have no claims whatever to the 52 per cent interest in the St. Louis Amusement Company (R. 133). These new bondholders, like the old bondholders, have voting trust certificates for the stock of the corporation which passed with the bonds. Of the stock authorized and issued under the original plan of reorganization 25 per cent was allotted to second mortgage bondholders and 10 per cent for the management of the corporation, and this 35 per cent of the stock issued also represented by voting trust certificates has not the slightest interest in the stock of the St. Louis Amusement Company.

The plan will therefore result in the following advantages to persons who have no claim which can be recognized in the disposal of these valuable assets owned by the holders of the certificates of deposit.

1. The control of the St. Louis Amusement Company will pass to the voting trustees of the Ambassador Building Corporation who, under the voting trust agreement, function until 1953.

2. Holders of income bonds of the Ambassador Building Corporation in an amount of approximately $1,000,000, representing 30 per cent of the outstanding bond issue, will participate equally and ratably with the holders of 70 per cent of the outstanding bonds, who are holders of certificates of deposit, in all the benefits and advantages de-

rived from the ownership of the common stock in the Ambassador Investment Corporation.

3. Subject only to the superior rights of the income bondholders the holders of voting trust certificates for 35 per cent of the stock of the Ambassador Building Corporation allotted to the second mortgage bondholders and to management will participate in the benefits and advantages derived from the ownership of the common stock in the Ambassador Investment Corporation.

As against these advantages gratuitously given to interests which have no claim, the holders of certificates of deposit are being deprived of the direct and unqualified ownership of the 52 per cent interest in the St. Louis Amusement Company and are reeciving therefor, under the plan, a $12.00 non-income liquidating preferred stock and a diluted, remote and indirect participation in the common stock of the Ambassador Investment Corporation, which is to own and control the St. Louis Amusement Company stock. This latter participation, however, is only to be given to those holders of certificates of deposit who are still the owners of the income bonds of the Ambassador Building Corporation. The holders of certificates of deposit who have sold the income bonds of the reorganized company will receive for their pro rata and unqualified ownership of the St. Louis Amusement Company stock only the liquidating non-income preferred stock of the Ambassador Investment Corporation.

The Circuit Court of Appeals in its opinion (R. 223) recognizes that the holders of the certificates of deposit are entitled as against the other interests above mentioned to the full participation exclusively in the assets dealt with in the plan. The Court, however, refuses to strike down the plan and suggests several matters which the Court believes saves the plan (R. 220). Thus the Court says:

"The arrangement for issuing common stock appears to be for the purpose of simplicity of control and management rather than with the idea of any financial advantage to accrue at least for several years. Such control, if exercised for the benefit of certificate holders, would also be for the benefit of bondholders and other interests. Their relations are similar and their interests mutual."

The difficulty with the foregoing suggestion of the Court is that the bondholders, who are not certificate holders, and the other interests referred to have no legal or moral claim to any such benefits. Then, too, there is no doubt that the common stock in the new corporation presents a definite financial advantage. When the Court says that it will not accrue for a period of several years, presumably it has in mind that it will take a number of years to liquidate the interests of the preferred stockholders. The best answer to this observation of the Court is the fact that, in the alternative plan proposed by the petitioner, the petitioner and Fanchon & Marco Enterprises, Inc., in consideration for this common stock offered to put in $300,000.00 in new capital, including $100,000.00 cash and the 42 per cent interest in the St. Louis Amusement Company, for which they would take a preferred stock subordinate to a $15.00 preferred stock carrying prior dividend rights at the rate of 5 per cent per annum and a complete priority on liquidation.

The Court of Appeals considered, as an argument for fairness of the plan (R. 220), that the Ambassador Building Corporation offered to pay the certificate holders who had sold their bonds $8.00 per share of the new preferred stock. We do not see how that offer affects the fairness of the plan. The Court in its opinion (R. 217) draws a stronger conclusion from the statement made by counsel for petitioner at the hearing in the District Court than we submit should be drawn. Counsel stated, "We are

not making any complaint of the adequacy or inadequacy of the $8.00; we make no point of that." We do not believe that that is a concession that $8.00 was a fair price. However, we cannot see that this consideration is material to the fairness of the plan. The right of a security holder to challenge the fairness of the plan ought not to depend on whether he has the privilege of selling his securities at a price fixed by the proponent of the plan.

With all deference to the Court of Appeals, we submit that the foregoing considerations suggested by the Court deal with collateral and perhaps imponderable matters which are analogous to those rejected by this Court in **Case v. Los Angeles Lumber Products Company,** 308 U. S. 106, 122, 123.

The approval of the plan by the Courts below represents a complete departure from the absolute priority rule laid down by this Court in the following cases:

Northern Pacific Railway Company v. Boyd, 228 U. S. 482;

Kansas City Terminal Railway Company v. Central Union Trust Company, 271 U. S. 445;

Case v. Los Angeles Lumber Products Company, 308 U. S. 106;

Consolidated Rock Products Company v. Du Bois, 312 U. S. 510.

B.

The approval by the District Court of the plan of the Bondholders' Committee and the rejection of the Scherck, Richter plan was not a determination by the Court of a question of business policy. It was the determination by the Court of a matter that called for its informed and independent judgment which affected the property rights of all the security holders.

The Court of Appeals in its opinion (R. 221) concluded that "the question presented to the lower court was un-

der the circumstances disclosed by this record, a question of business policy calling for the exercise of business judgment. Its decision should not be disturbed in the absence of an abuse of discretion." The Court has not pointed out wherein the plan involves any question of business policy. We assume that the Court had in mind administrative orders which are made in the course of receivership cases and which do not affect individual property rights. In the case at hand the judgment was made by the Court on matters which definitely affected the property rights of the certificate holders. The plan takes away beneficial property rights from the certificate holders and gives benefits and advantages to persons and interests who have no claim entitled to recognition. The numerous certificate holders were not requested to give their affirmative vote or assent to the plan such as is required in proceedings under the Chandler Act. In lieu of that they were given the opportunity to make their objections to the plan at a hearing. The only certificate holders who appeared at the hearing were objecting certificate holders, including the petitioner and Julia A. Healy. The District Judge, under the principles laid down by this Court, was virtually the guardian of the numerous certificate holders whose rights were affected by the Court's judgment on the plan submitted. This was particularly true in the instant case, because of the anomalous position occupied by the Chairman of the Bondholders' Committee. In this situation the guiding principles laid down by this Court are particularly applicable.

> **First National Bank v. Flershem**, 290 U. S. 504;
> **National Surety Company v. Coriell**, 289 U. S. 426;
> **Case v. Los Angeles Lumber Products Company**, 308 U. S. 106.

The Court was not only required to scrutinize the plan of the Bondholders' Committee for any inequities or dis-

advantages, but was also required to give careful consideration to the Scherck, Richter plan in order to determine whether that plan was more beneficial and advantageous to the holders of certificates of deposit. The advantages to the certificate holders of the Scherck, Richter plan are apparent (R. 64-68, 104-111):

1. Under the Scherck, Richter plan all of the holders of certificates of deposit are treated on the same basis and no gratuity is given to persons and interest who have no claims.

2. As compared with a $12.00 nonincome liquidating preferred stock given under the plan of the Bondholders' Committee, the holders of certificates of deposit, under the Scherck, Richter plan, received a $15.00 prior preferred stock entitled to dividends of 5 per cent.

3. The prior preferred stock given to the holders of certificates of deposit is cushioned not only by the 52 per cent interest in the St. Louis Amusement Company received from the certificate holders, but also by the 42 per cent interest in that company contributed by Fanchon and Marco, and $100,000.00 in cash contributed by Scherck, Richter Company for the second preferred stock and the common stock.

The approval by the District Court of a plan which contains the inequities to which we have referred and its rejection of a plan which is manifestly more advantageous to the holders of certificates of deposit, do not, we submit, measure up to the scrutiny and independent judgment required of the Court under the principles announced by this Court in the foregoing cases.

C.

The dual position occupied by Thomas N. Dysart, Chairman of the Bondholders' Committee, required special scrutiny of the plan.

Mr. Thomas N. Dysart, Chairman of the Bondholders' Committee, was the chief protagonist of the plan submitted (R. 122-123). The plan was embodied in the contract entered into by the Bondholders' Committee, of which he is Chairman, and the Ambassador Building Corporation, of which he is President and a voting trustee (R. 123). The only other active member of the Committee is Frederick W. Straus, who lives in Chicago, and who is a member of the original underwriting house of S. W. Straus & Sons, which sold the securities. Mr. Dysart testified that in negotiating the contract embodying the plan he was really looking out for the interests of the holders of the certificates of deposit, particularly the 30 per cent interest who had sold their new bonds in the company, and not the holders of certificates of deposit who still retained the new bonds in the company (R. 128).

We may accept the avowals and disavowals of Mr. Dysart with reference to negotiations of this contract as has been given in full sincerity. His testimony, however, reveals the fact that he did not have his eye singly to the holders of the certificates of deposit and particularly such holders as had sold their new bonds in the reorganized company. He believed that the full discharge of his duties was accomplished in his embodying in the plan an offer by the Ambassador Building Corporation to pay $8.00 per unit to such certificate holders who had sold their bonds (R. 128). His main consideration was for the Ambassador Building Corporation and the new bondholders (R. 126).

By reason of the conflict of interest here involved and the dual position occupied by him, Mr. Dysart did not qualify to represent the certificate holders in the formula-

tion and negotiation of the plan of reorganization in which the corporation of which he was President and voting trustee was receiving benefits and advantages.

In **American Mutual Life Insurance Company v. City of Avon Park, Fla.**, 311 U. S. 138, 146, this Court said:

> "As we said in Case v. Los Angeles Lumber Products Company, 308 U. S. 106, 114, 60 S. Ct. 1, 6, 84 L. Ed. 110, 'The court is not merely a ministerial register of the vote of the several classes of security holders.' The responsibility of the court entails scrutiny of the circumstances surrounding the acceptances, the special or ulterior motives which may have induced them, the time of acquiring the claims so voting, the amount paid therefor, and the like. See Continental Insurance Co. v. Louisiana Oil Refining Corp. (5 Cir.), 89 F. (2d) 333. Only after such investigation can the court exercise the 'informed independent judgment' (National Surety Co. v. Coriell, 289 U. S. 426, 436; Case v. Los Angeles Lumber Products Co., supra, 308 U. S., page 115), which is an essential prerequisite for confirmation of a plan."

In **Woods v. City National Bank & Trust Company**, 312 U. S. 262, 269, the observations of this Court, although in another connection, are pertinent.

> "A fiduciary who represents security holders in a reorganization may not perfect his claim to compensation by insisting that although he had conflicting interests, he served his several masters equally well or that his primary loyalty was not weakened by the pull of his secondary one. Only strict adherence to these equitable principles can keep the standard of conduct for fiduciaries 'at a level higher than that trodden by the crowd.' See Mr. Justice Cardozo in Meinhard v. Salmon, 249 N. Y. 458, 464, 164 N. E. 545, 546, 62 A. L. R. 1."

The plan presented by the Bondholders' Committee as embodied in this contract with the Ambassador Building Corporation was submitted to the Court as having resulted from real negotiations between adverse interests and undoubtedly was weighted with that consideration. That situation, however, was entirely on the surface. It did not represent the core of the reality.

The petitioner, therefore, respectfully submits that the Court, in the exercise of its supervisory power, grant to the petitioners a writ of certiorari and thereafter review and reverse the decision of the lower court.

Respectfully submitted,

LYLE M. ALLEN,
B. L. LIBERMAN,
Counsel for Petitioner.

Office - Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

SCHERCK, RICHTER COMPANY, a Corporation,
Petitioner,
v.
THOMAS N. DYSART and FREDERICK W. STRAUS, as Members of the Central Properties First Mortgage Bondholders' Committee, and AMBASSADOR BUILDING CORPORATION, a Corporation,
Respondents.

No. 930.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT.

PRELIMINARY SUMMARY.

This proceeding does not involve a reorganization under Section 77B of the Bankruptcy Act. Neither does it involve a corporation reorganization in equity. It involves only, as stated by the United States Circuit Court of Appeals of the Eighth Circuit, "a sale of certain properties acquired" by a bondholders' committee and held by such committee subject to the committee's debts and expenses, solely for the holders of Certificates of Deposit issued by the Committee.

The Certificate of Deposit Holders had already received, in the reorganization of the Central Properties, Inc., the bonds and 65 per cent of the stock of the Ambassador Building Corporation, which owned and operated the Ambassador Building, a large office building in which was also located the Ambassador Theatre.

Some 30 per cent of the Certificate of Deposit Holders had, prior to this sale by the Committee, sold their stock and bonds of the Ambassador Building Corporation.

The Certificate of Deposit Holders were thus divided into two classes—this 30 per cent who had sold their stock and bonds of the Ambassador Building Corporation, among which was the Scherck, Richter Company, the Petitioner, and the remaining 70 per cent, who still held their bonds and stock of the Ambassador Building Corporation.

As to the first class, including the Petitioner, the price which they receive under the terms of the sale is shown by the evidence (R. pp. 91-99, 100-101, 129-132) and admitted by Petitioner in the trial below in the District Court (R. pp. 206-7) to be the full value of their interest in the securities held by the Committee. In other words, the record shows that the value of the securities held by the Committee was equal to $6.40 for each $100 of face amount of Certificates of Deposit (R. 91), and this class, including Petitioner, has, under the terms of the sale, the option to receive $8 in cash for each $100 of face value of Certificates of Deposit held by them, and, further, the Petitioner here, at the hearing in the District Court (R. 207), expressly stated: "We are not making any complaint of the adequacy or inadequacy of the $8." This class, to which Petitioner belongs, is thus to receive a price in excess of the value of its rights, as shown by the evidence, and admittedly adequate.

No one of the other class—who still hold their Ambassador Building Corporation securities—is making any

objection whatever to the sale. As to this other class—who own, as stated, 70 per cent of the bonds and certain of the stock of the Ambassador Building Corporation:

This class, under the terms of the sale, get all of the preferred stock of a new corporation to be formed under the name of Ambassador Investment Corporation, which new corporation acquires the main assets (52 per cent of the St. Louis Amusement Company stock) of the Committee, on which preferred stock they are entitled to receive, by way of liquidating dividends, $12 in cash for each $100 in face amount of Certificates of Deposit held by them (an adequate price) (R. pp. 89-101), after which the remaining value of the assets transferred to this new company by the Committee, if any, will go to the Ambassador Building Corporation, of which this class owns 70 per cent of the bonds. If by any chance the said bonds, which are now selling at $30 per $100 of par value, should be paid out at par, then if anything should be left it will go to this class as the owners of a majority of the stock of the Ambassador Building Corporation and to other such stockholders, which latter, in fact, in the first place, had no interest in the assets which were held by the Committee.

The record discloses that the advantage to this latter class of Certificate of Deposit Holders in having the control of the St. Louis Amusement Company in the Ambassador Building Corporation, so as to protect their Ambassador Building Corporation bonds and stock, is of far greater value than the possibility of other holders of such bonds and stock of the Ambassador Building Corporation receiving anything after this class has received the full value of their Certificates of Deposit by way of such cash liquidating dividend of $12 for each $100 of Certificates of Deposit.

MORE IN DETAIL.

This matter came before the District Court on the report of the Central Properties Bondholders' Committee, seeking that court's approval of a contract entered into by that Committee with the Ambassador Building Corporation for the sale of all of the assets held by the Committee, including the 52 per cent of the capital stock of the St. Louis Amusement Company, which was the real asset held by the Committee.

The Committee was originally organized in 1932 when a bill was filed in the District Court to foreclose a first mortgage of $4,050,000 on the Ambassador Building. A decree of foreclosure was entered and a sale had, and the Plan of Reorganization submitted to the court and approved by it, and its action affirmed by the Circuit Court of Appeals of the Eighth Circuit (79 Fed. [2] 804). There had been deposited with the Bondholders' Committee's Depositary at that time about $2,900,000 of the Central Properties Bonds (R. p. 12). Under the Plan the depositing bondholders received par for par of bonds of the new company (Ambassador Building Corporation) for the Central Properties bonds which they had deposited, and, in addition, 65 per cent of the stock of the new Ambassador Building Corporation. The remaining 35 per cent of the stock of the new company was given 25 per cent to the holders of certain other bonds known as General Mortgage Bonds and 10 per cent to the proposed management of the new company. The Petitioner, Scherck, Richter Company, as the owner of $11,400 of Central Properties Bonds which it had deposited with the Committee's depositary, received new bonds and stock on said basis. Nondepositing bondholders received about 38 cents on the dollar.

All of the stock of the new Ambassador Building Corporation was placed in the names of voting trustees desig-

nated by the court, among whom was Thomas N. Dysart, a member of the Bondholders' Committee.

The Central Properties Bonds were guaranteed by a company known as "Skouras Bros. Enterprises, Inc.," and the Plan of Reorganization of the Central Properties Corporation provided that if the Bondholders' Committee should at any time recover anything on that guaranty it should be distributed pro rata among the Certificate of Deposit Holders (R. p. 80). The decree which approved the Plan "reserved jurisdiction for the purpose of supervising and carrying out such plan * * * and determining that securities had been distributed pursuant to said Plan * * * to the parties entitled thereto."

The principal asset of Skouras Bros. Enterprises, Inc., the guarantor, was 52 per cent of the capital stock of St. Louis Amusement Company, which operated about twenty second-run moving picture theaters in the City of St. Louis and vicinity (R. p. 10).

Skouras Bros. Enterprises, Inc., went into bankruptcy and the Committee had its claim allowed and purchased, at bankruptcy sale, the bankrupt's assets, including the 52 per cent of the St. Louis Amusement Company stock. The Committee at first borrowed from the Boatmen's National Bank and then from Ambassador Building Corporation $100,000 to pay other creditors of Skouras Bros. Enterprises, Inc.—mainly nondepositing Central Properties Bondholders who received $6.50 on each $100 face amount of bonds held by them (R. pp. 22, 24).

This 52 per cent interest in the St. Louis Amusement Company stock was thus acquired after the original plan had been carried out. Had it been acquired prior to the confirmation of the plan it would have been turned over to the Ambassador Building Corporation under the plan (R. p. 3). "That is where it should have been all the time" (Dysart—R. p. 137). The Bondholders' Committee

had early decided that it was necessary for the Ambassador Building Corporation to obtain long-term franchises for first-run motion picture products, and had further decided that a sale of said 52 per cent of the St. Louis Amusement Company stock to anyone other than the Ambassador Building Corporation would ultimately adversely affect (1) the Ambassador Building Corporation, and (2) the holders of its Certificates of Deposit, which in the first instance were held by the same parties (R. p. 18). This was all set forth in the Bondholders' Committee report filed in the District Court in May, 1937.

As testified to by Mr. Dysart at the hearing in the District Court in the present proceeding (R. p. 137):

> "For all of these years the Committee and I, myself, have felt that control of the Amusement Company should be where it would have been if we could have simultaneously acquired these assets with the acquisition of the Ambassador Building. They would have gone into the Ambassador Building Corporation, they would have been handled by the trustees and approved by the court in the reorganization, that is where it should have been all the time, and if it had not been for that hiatus created by the selling of about thirty per cent of these C/D holders of their interest in the Ambassador, we could have handed it to them and there would never have been any occasion for this whole thing."

At another place (R. p. 124) Mr. Dysart had this to say:

> "But if we could have—if we could have acquired under the guaranty or under a deficiency judgment we, of course, by paying off the mortgage that was on it, could have acquired those assets simultaneously with the Ambassador Building, and it would have all gone to the Ambassador Building. The C/D's would have been canceled, the Committee would have been gone, and the whole thing would have been settled. But we could not do it."

Mr. Dysart was one of the trustees originally approved by the District Court of a voting trust for the Ambassador Building Corporation's stock, and had been elected President of Ambassador Building Corporation. After the acquisition of the St. Louis Amusement Company stock Mr. Dysart became President of that company also.

The theater in the Ambassador Building had been leased to St. Louis Ambassador Theatre, Inc., the principal asset of which said lessee was said lease. The said lessee was owned and controlled by Fanchon & Marco Enterprises, Inc., and Fanchon & Marco had a management contract with the St. Louis Amusement Company which provided that in the event of a default on the part of the lessee of the Ambassador Theatre the said management contract was subject to cancellation (R. pp. 97-98). This management contract had been entered into by the Bondholders' Committee with Fanchon & Marco on the 30th day of July, 1936, and it gave Fanchon & Marco the option for a period of ten years to purchase the Committee's 52 per cent of the stock of the St. Louis Amusement Company at the price and upon the terms of any bona fide offer, it being agreed, however, that the Committee should have the right, subject to such option, to sell said St. Louis Amusement Company stock to the Ambassador Building or to a corporation which said company might create for the purpose of taking title to said stock (R. pp. 35, 100, 130, 131).

The right to cancel the management contract between the St. Louis Amusement Company and Fanchon & Marco, in the event of a default under the Ambassador Theatre lease, was given partly in consideration of said option (R. p. 130).

This management contract was clearly profitable to Fanchon & Marco and the aforesaid lease was a very valuable asset to Ambassador Building Corporation. It was, therefore, desirable that the control of the St. Louis Amuse-

ment Company be in the hands of the Ambassador Building or persons closely affiliated with it, and not in the hands of Fanchon & Marco. As to this Mr. Turley, testifying in the District Court, said:

"Q. Will you state to the court why it is necessary or desirable that the control of this stock be in the hands of persons either actually owning or closely affiliated with the Ambassador Building? A. Well, to me, the principal reason for that desirability is the fact that the tenant is the Ambassador Theatre—is the St. Louis Ambassador Theatre, Incorporated, whose principal asset is the lease, and the fact that the management contract in St. Louis Amusement Company contains a clause by which, in the event of a default on the part of the Ambassador Theatre tenant in the payment of its rent, the contract—the management contract of the St. Louis Amusement is likewise subject to cancellation. That is one of the largest, most important factors that makes it desirable for Missouri Ambassador Building Corporation to control the 52 per cent continual flow of rental into the Ambassador Building.

Q. Mr. Turley, just elaborating there, in bringing that out a little more specifically: The lease which is now in effect of the Ambassador Theatre, you consider it a desirable lease or valuable lease from the standpoint of the Ambassador Building. A. I think it is; yes, sir.

Q. And do you consider it necessary that that lease be kept in effect? A. It is very important for the payment of the expenses on the property and the distribution of interest to the bondholders.

Q. The lessee in that lease is a corporation having no other assets of any substance? A. That is as I understand it; yes, sir.

Q. The lessee in that lease is a corporation owned or controlled by Fanchon & Marco? A. That is right.

Q. Fanchon & Marco have this management contract? A. That is right.

Q. And that contract you consider a desirable contract from Fanchon & Marco's standpoint? A. Yes, sir.

Q. Profitable to them? A. Yes, sir.

Q. And what you are saying, then, is that if Fanchon & Marco, for example, could get control of this 52 per cent of the Amusement Company stock, you would anticipate a default under the Ambassador Theatre lease? A. I would not say I would anticipate a default. I would say that one of the reasons for them continuing to perform under that lease would be taken away from them.

Q. That is putting it better. Now, did you actually have something similar to that occur within the past two years? A. Yes, we did.

Q. Will you state to the court just what it was? A. Approximately two years ago, the tenant was in default in the payment of rental, and notice had been given by the tenant of the termination of the lease. We were told that we could be prepared on a given day to take over possession of the theatre. Mr. Arthur's attention was called to the provisions of St. Louis Amusement Management contract, and the rental was paid and the default cured.

Q. Mr. Turley, are there any other reasons why it is desirable that the Ambassador Building have control of this 52 per cent of this St. Louis Amusement Company stock? A. Well, the protection of property, from the standpoint of film purchasing and other advantages with the film companies, which makes it very desirable for the owner of the Ambassador to also own 52 per cent of the Amusement Company.

Q. And putting it another way, would it be detrimental to the Ambassador Building if control of that stock passed to a competitor of the Ambassador Theatre? A. I feel certain it would, yes, sir'' (R. pp. 97-98-99).

In the same connection, Mr. Dysart of the Committee has this to say (R. 130):

"Now, Fanchon & Marco, we did not want to give them an option, we wanted to be free to sell this; but we could not make a management contract with them without giving them an option, for the reason talk had been heard that they were aspiring to be owners of your chain theatres, and if they took the management of it and it had not been doing so well up to that point, and they could show you where they could make a whole lot of money, it would not be fair to them or fair to the half interest which they owned, to let them build it up and then sell out from under them the control of the company. Before they, however, ever got this concession, we were always fearful that they might run out on the Ambassador lease and the Missouri lease. * * * It would have been very detrimental to the Ambassador Theatre and its income, and would have been detrimental to its bondholders and its stockholders, if they had canceled or defaulted on that lease. So in return for giving them the option to purchase the Amusement Company stock in the event we have a bona fide bid for it, they agreed to a provision in the management contract that if either of the operating companies at the Ambassador or the Missouri defaulted, then that would automatically permit a termination of the management contract, under the Amusement Company's management contract with Fanchon & Marco."

And, while talking of the advantages to the Ambassador of the control of this Amusement Company stock, it should also be borne in mind that the holders of the Certificates of Deposit issued by the Committee were, to the extent of 70 per cent of them, the holders of the bonds and stock of Ambassador Building Corporation and in the same proportions, and the interest of that 70 per cent, in the line of the plan from the very outset, should be protected if at the same time the rights of the other 30 per cent of the Certificate of Deposit Holders were not infringed upon.

And then, too, this ten-year option running until 1946

which Fanchon & Marco held made it practically impossible for the Committee to find any outside purchaser for the St. Louis Amusement Company stock (R. 131). As to this Mr. Dysart (R. 131) says:

> "But that option giving the Fanchon and Marco the refusal at any price simply made it impossible for the Committee to find an outside purchaser for this stock. We tried any number of times—I, myself, tried many times to dispose of this stock for cash, because if we could have sold it for cash, it would have been a simple matter to distribute that cash pro rata to the certificate of deposit holders, and that would have ended the whole thing, but we always ran up against the difficulty, no one would bid for it because that option stood in the way. Another thing, we did not want to dispose of it in a way that would not protect the Ambassador Theatre lease, because to have acted that way would have been very detrimental."

So, with this general picture, the Bondholders' Committee, under date of July 26, 1940, entered into a contract with the Ambassador Building Corporation for the sale of its St. Louis Amusement Company stock and the other assets of the Committee to the Ambassador Building Corporation, which contract is set forth at page 31 of the record. This contract was the result of negotiations between a special committee of the Board of Directors of the Ambassador Building Corporation, consisting of Mr. Farrington, Mr. Morse and Mr. Baer, and, on the other hand, a committee consisting of Mr. Dysart and Mr. Straus. It appeared that since the original reorganization, pursuant to the foreclosure decree, some 30 per cent of the holders of Certificates of Deposit had sold the Ambassador Building Corporation bonds received by them on the reorganization (R. p. 117). However, under the terms of the reorganization plan, they retained their rights to the enforcement of the guaranty of Skouras Bros. Enterprises, Inc. of

the Central Properties Corporation bonds. The remaining 70 per cent of the holders of Certificates of Deposit, as stated, had retained their Ambassador Building Corporation bonds, and in the negotiations between the Committee and the Ambassador Building Corporation leading to the aforesaid contract of sale the Committee took the position that those bondholders were adequately represented by the Board of Directors of the Ambassador Building Corporation, and, while taking care that the plan was fair to those bondholders, the Committee's principal efforts were directed toward the procurement of a cash offer to the holders of Certificates of Deposit who no longer had any interest in the Ambassador Building Corporation (R. pp. 127-128). And then, under date of September 3, 1940, the Central Properties First Mortgage Bondholders' Committee filed its report and petition for an order approving the said contract with the Ambassador Building Corporation. An order was duly entered, giving any party a right to file written objections thereto. Due notice was given by mail and by publication to all Certificate of Deposit Holders (R. pp. 44, 45). The Petitioner, as the owner of $11,400.00 in face amount of Certificates of Deposit of Central Properties First Mortgage Bonds, who had prior to May 1, 1940, sold its bonds and stock of the Ambassador Building Corporation (R. pp. 61-68), filed no objections to the proposed contract, but submitted an alternative proposal to acquire the St. Louis Amusement Company stock. This alternative proposal contemplated the co-operation with Petitioner of Fanchon & Marco.

Another Certificate of Deposit Holder, Julia Healy, who still held her Ambassador bonds and stock, filed objections to the sale and also to the Petitioner's alternative proposal (R. pp. 68, 77), but these were overruled and no appeal taken.

The cause was heard in the District Court on the statements and evidence of all the parties interested.

OPENING STATEMENTS.

The issues, so far as Petitioner is concerned, were limited by the opening statement of counsel.

> "Mr. McRoberts: The only two objections which have been filed—First, there is an objection on behalf of a certificate holder who still holds the certificate and bond of Ambassador Building Corporation, and who contends or answers the corporation did not get a good enough deal; and objections filed on behalf of a prospective purchaser of this stock, who wants to submit another plan to Your Honor for the acquisition of this stock, which would take it out of the control and out of the hands of the Ambassador Building Corporation.
>
> Mr. Allen: I represent Scherck, Richter Company, a Missouri corporation. * * * They were the owner, or at least the beneficial owner, I think, of certificates of deposit of Central Properties Corporation First Mortgage Bonds having an aggregate face value of $11,400, and as such owner, they did receive these new income bonds and stock of Ambassador Building Corporation at the time they were issued and pursuant to reorganization. It is my understanding that my client, however, did sell all those bonds prior to May 1, 1940. We are not making any point of that. We are, however, not making any point as to the fact that the $8.00 is adequate or inadequate; we are making no point about that. * * *
>
> The Court: I understood Mr. McRoberts to say just now that none of these parties are complaining.
>
> Mr. Allen: I do not understand that we are complaining. Mr. McRoberts is correct, that we are not making any complaint of the adequacy or inadequacy of the $8.00, we make no point of that.
>
> The Court: All right. * * *
>
> Mr. Allen: Our attitude is simply that we have a plan which we think confers better security and better protection, to the certificate holders, in that they will have behind their stock not only the stock of the

St. Louis Amusement Company, which the Committee owns, but also this other stock of the St. Louis Amusement Company which Fanchon & Marco owns."

PROPOSED CONTRACT BETWEEN THE COMMITTEE AND AMBASSADOR BUILDING CORPORATION.

Under the contract between the Committee and Ambassador Building Corporation the Committee is to organize a new corporation to be known as Ambassador Investment Corporation, with 36,557 shares of liquidating preferred stock of the par value of $12 each, and 100 shares of common stock of the par value of $100 each. The Committee will transfer to the new corporation the 52 per cent of the outstanding stock of the St. Louis Amusement Company, all subject to the option referred to from the Committee to Fanchon & Marco. The Committee will likewise transfer to the new corporation certain other securities which the evidence shows to be of no value. The new corporation will issue and deliver to the Bondholders' Committee the aforesaid 36,557 shares of preferred stock, and 100 shares of its common stock of the par value of $100 each, and the new company will undertake to pay a certain Arthur note and interest amounting to $12,874.46.

Upon the completion of the organization the Committee will deliver all but 1,875 shares of said liquidating preferred stock to the holders of the Certificates of Deposit issued on behalf of the Committee at the rate of one share of such preferred stock for each $100 in par amount of bonds represented by said certificates. The remaining 1,875 shares of said preferred stock will be transferred to C. M. Turley in liquidation of his claim for approximately $15,000 against the Committee.

The Committee will sell to the Ambassador Building Corporation the common stock of the new corporation and First Mortgage Notes and trust deed securing the same

on West End Lyric Theatre, of the face amount of $41,000, with interest due on November 7, 1940, and thereafter, and $51,000 par value of Second Mortgage Notes and deed of trust of St. Louis Amusement Company, with interest due August 15, 1940, which the evidence showed to be worth their face value. In consideration of all the foregoing, the Ambassador Building Corporation will cancel the indebtedness of the Committee to it in the amount of $35,000 and interest, and will cancel the Jeffries note and interest (the amount of which the record does not disclose) and will pay to the Committee $22,000 in cash with which it is to discharge all of its remaining obligations, and will agree to hold the Committee harmless against any liability arising out of the contract, **and will further agree to offer to purchase the shares of preferred stock of the new corporation from all persons receiving the same who had prior to May 1, 1940, sold and transferred their bonds and stocks of Ambassador Building Corporation, for the sum of $8 per share of preferred stock.**

The Articles of Incorporation of the Ambassador Investment Corporation submitted as an exhibit to the Committee's report (R. 35, 41) fixed the rights and priorities of preferred stock as follows:

> Liquidating preferred stock, at the par value of $12 per share, on which no dividends shall be paid except by way of liquidation and, whenever there is an accumulation of net profits, surplus or capital of $74,000 in cash or securities, a liquidating dividend on the preferred stock of $2 per share shall be payable. The preferred stock has no voting power but is entitled to priority to the extent of $12 per share in the event of liquidation or dissolution of the company. Furthermore, no dividends on the common stock shall be paid until the preferred stock has been fully liquidated.

THE SCHERCK, RICHTER PLAN.

The alternative plan of Petitioner Scherck, Richter Company, as set out in its proposal to the Committee (R. 64), proposed to acquire from the Committee (1) the same St. Louis Amusement Company stock, (2) the same other worthless securities, (3) the same First Mortgage Notes of the West End Lyric Theatre, (4) the same Second Mortgage Notes of St. Louis Amusement Company.

It proposed to cause to be organized a corporation with a capital consisting of Five Per Cent Prior Preferred Stock, Five Per Cent Preferred Stock, and No Par Value Common Stock, as follows:

> (a) 34,682 shares of Five Per Cent Prior Preferred Stock of the par value of $15 per share, same being entitled to priority with respect to dividends to the extent that dividends at the rate of 5 per cent per annum on preferred stock shall be declared and paid in any year prior to the payment in such year of dividends on the Five Per Cent Preferred Stock and, upon liquidation, shall be entitled to receive the sum of $15 per share prior to the Five Per Cent Preferred Stock or the Common Stock. The Prior Preferred Stock shall have no voting rights and shall be callable, in whole or in part, at $15 per share. It further provided for a sinking fund; that a sinking fund of 25 per cent of the net earnings after the payment of dividends on **both** Preferred stocks be set aside and used to purchase or call for redemption the outstanding Preferred Stock.
>
> Note the dividend on the Prior Preferred stock is not cumulative and the Sinking Fund is only after both classes of Preferred have received dividends at 5 per cent.
>
> (b) 34,700 shares of Five Per Cent Preferred Stock at $15 per share, such Preferred Stock to be entitled to dividend priorities over the Common Stock in the same manner that the Prior Preferred Stock is enti-

tled to priority over both the Preferred and the Common Stock.

(c) 1,000 shares of no par value common stock.

It then proposed to issue and deliver to the Committee 36,682 shares of the aforementioned Five Per Cent Preferred Stock in payment for the aforesaid 52 per cent of St. Louis Amusement Company stock, which Five Per Cent Preferred Stock will be sufficient to permit the Committee to distribute to each holder of a Certificate of Deposit under the plan of reorganization of Central Properties Corporation one share of such Five Per Cent Preferred stock for each $100 face value of bonds evidenced by said certificate.

It next proposed to cause said new corporation to purchase from the Committee the other assets above enumerated for such amount in cash not exceeding $90,000 as may be necessary to meet any indebtedness of the Committee. It proposed to subscribe for 6,668 shares of Five Per Cent Preferred Stock and 500 shares of no par value Common Stock and pay therefor the sum of $10,020 in cash. It proposed to cause the corporation to acquire from Fanchon & Marco Enterprises, Inc., 42 per cent of the stock of St. Louis Amusement Company in consideration of 20,032 shares of the Five Per Cent Preferred Stock and 500 shares of the no par value Common Stock of the new corporation. It proposed to release the Committee from the Fanchon & Marco option and to have Fanchon & Marco enter into a new management contract, all subject to the approval of the court.

VALUE OF ASSETS HELD BY THE COMMITTEE.

Clarence M. Turley, Treasurer of St. Louis Amusement Company, who had appraised theaters for Warner Bros., Fox, Twentieth Century Fox, Chase National Bank, Boat-

men's National Bank and other clients, testified that the St. Louis Amusement Company stock held by the Committee for the Certificate of Deposit Holders, based on average earnings of St. Louis Amusement Company for the past five years, was worth the equivalent of $6.40 for each $100 face amount of Certificates of Deposit outstanding (R. 91-99).

In arriving at this value, based on earnings, Mr. Turley also took into consideration the book value of the St. Louis Amusement Company's assets. We quote Mr. Turley:

> "Q. Have you made a computation and arrived at an opinion as to the value of the shares of stock of St. Louis Amusement Company presently owned by the bondholders' committee, and expressed in dollars per hundred dollars of deposited bonds? A. Yes, sir. I have approached the valuation of this stock with the feeling that the person or persons who would normally desire to buy it would be some one engaged in the theatre business, and have taken the average earnings of the property for the past five years, capitalized those earnings at seven times, to arrive at a value, and have come to the conclusion that that stock is worth the sum of $6.40, translated into the equivalent of first mortgage certificate owners—certificate of deposit owners of Central Properties Bondholders' Protective Committee. In making this computation, however, I have taken—I have considered the appraisal of the physical assets of St. Louis Amusement Company and adjusted the real estate and leasehold values upwards by the sum of approximately fifty-six thousand dollars. I have taken into consideration the book value of the stock as represented by these adjusted valuations, and feel that the $6.40 is the proper amount (R. 91).
>
> Q. Is there any formula of so many times earnings that is ordinarily used in the sale or purchase of theatre chains? A. I cannot tell you about theatre chains. I can tell you about individual theatres. They

vary it all the way from four times to seven times the annual earnings, depending on the length of the leases.

* * * * * * *

Q. Well, now, applying that to this Exhibit A balance sheet, you capitalized these average net earnings at what rate? A. Seven times the average net earnings. About 14.2 per cent.

Q. What did you get as a result of that figure? A. $242,950 for the A and B stock, owned by the Committee."

It is to be noted that while Mr. Turley testifies that the formula varies from four to seven times the annual earnings in arriving at his valuation of the stock, he takes the formula as seven times, or the highest ratio used.

And this value of $6.40 for each $100 of Certificates of Deposit, based on average earnings, as above stated, is arrived at by Mr. Turley on the basis of the stock being free from the Fanchon & Marco option (R. 100, 101), which, according to all the evidence, makes the stock less salable. In other words, Mr. Turley is placing a value on this stock free and clear of any option.

Mr. Dysart, Chairman of the Committee, said that he did not really know what the value of the stock was, but that the other creditors of Skouras Bros. Enterprises had received only $6.50 per unit out of the proceeds of the bankruptcy sale of the 52 per cent of St. Louis Amusement Company stock and the other assets of the bankrupt, and that the offer of Ambassador Building Corporation on the basis of $8 per each $100 of Certificates of Deposit was, in his opinion, fair (R. 129, 132).

Mr. Scherck, when questioned, estimated that the book value was "around $9" (R. 108). As a matter of fact, the actual book value of the entire company, as shown by the balance sheet of May 25, 1940 (R. 49, 50), appears to be

$635,629. According to Mr. Turley, however, the book value of the entire company is $663,172 (R. 96). But it is to be noted that there is included in this book value an item of $184,622 of non-operating property (see balance sheet, R. 49) and non-productive property.

Now, under the Ambassador contract, the Petitioner is entitled to receive $8 in cash if it so elects. It does not have to speculate on what may happen hereafter, and, certainly, under all the evidence, that sum of $8 would seem to be the full value of the interest of the Certificate of Deposit Holders in said St. Louis Amusement Company stock.

The only other assets which the Committee is selling to Ambassador are West End Lyric note for $41,000 and the St. Louis Amusement Company note for $51,000, and the Committee is to receive payment of the Arthurs note in the sum of $12,874.46, $22,000 in cash, and the cancellation of its own debt to Ambassador Building Corporation of $35,000, or, in all, $69,874.46, together with the payment of the Jeffries note, and, in addition, it is to receive the agreement of Ambassador Building Corporation to hold the Committee harmless and the agreement of the Ambassador Building Corporation to buy the proposed preferred stock of the new corporation at $8 per share in cash.

Petitioner did not question the adequacy of the $8 value below. We have called the court's attention to the fact that counsel for Petitioner below expressly advised the court that he was not contending that the price of $8 was inadequate.

As to the other Certificate of Deposit Holders who still hold their Ambassador Building Corporation bonds and stock, they, under the terms of the sale, are to receive one share of $12 liquidating preferred stock of the new Ambassador Investment Corporation formed to take over the assets held by the Committee for each $100 in face

value of Certificates of Deposit held by them, which, as shown by the evidence, have a value of only $6.40 per $100 in face value. This $12 liquidating cash dividend will be paid to those Certificate of Deposit Holders before anyone else receives anything whatever. After they—that is, after those Certificate of Deposit Holders have been paid the full value of their interest in the assets held by the Committee, if there is anything left, then 30 per cent of the bondholders of the Ambassador Building Corporation who are not Certificate of Deposit Holders may participate in such balance, but it is evident that, on account of the lease of the Ambassador Theatre and the Fanchon & Marco management contract with the St. Louis Amusement Company providing for its cancellation in the event of a default under the Ambassador Theatre lease and the advantage of operating the Ambassador Theatre in connection with the second-run houses which the St. Louis Amusement Company operates, the advantage to this class of Certificate of Deposit Holders, as holders of Ambassador bonds and stock, is of far greater value than the possibility of any Ambassador Building Corporation bondholder who is not also a Certificate of Deposit Holder participating in what, if anything, may be left after the Certificate of Deposit Holders have received the full value of their interest in the assets formerly held by the Committee.

COMPARATIVE MERITS OF THE SCHERCK, RICHTER PROPOSAL.

As to the comparative merits of the Ambassador contract and the Scherck, Richter proposal, they are set out herein, supra, and speak for themselves. In addition, the record discloses, in the testimony of Mr. Dysart (R. 143-144-145) the following:

"Q. This plan or proposal which is embodied in

the contract of July 26, 1940, Exhibit A, do you, as a member of the Committee, recommend that to the Court as a fair and equitable plan to all parties and interests? A. I do.

Q. And having in mind all of the terms and provisions of the Scherck Richter plan and the various objections which have been presented to the Court? A. I think it is much better than the Scherck Richter plan.

Q. Mr. Dysart, will you state specifically—you gave one reason, I believe, why you thought this plan of the Committee was better than the Scherck Richter plan. Are there any other reasons why you favor the Committee's plan? A. There are three reasons—three objections that I, as a member of the Committee, have to the Scherck Richter plan, whether this other plan was under consideration or not. One is, they make no provision to give the thirty per cent C. D. holders, who are no longer interested in Ambassador Building Corporation, they give them no opportunity to get out for cash and call it a day. That is one reason. Another is that the Scherck Richter plan, if it were accepted, or if the Committee should sell to the Scherck Richter people, that would immediately enable Fanchon and Marco to cancel their lease of the Ambassador Theatre, which would be detrimental to the Ambassador bondholders. Now, the third, and in my opinion the most important, objection is that for a mere promise to pay an additional three dollars in preferred stock, they take the control of the Amusement Company absolute, absolutely take it out of the hands of those who should continue to control it until the bondholders have been paid.

Q. And that, of course, means that it takes the control out of the hands of the trustees who have heretofore been appointed by this court, or approved by this court. A. That is right. Gives them nothing but a preferred stock, which has no priority, no definite assurance of payment.

Q. Excuse me just a minute. Will you state again, Mr. Dysart, so that it may be absolutely clear, why

you think that action should be taken at this time to dispose of this stock, rather than hold it for another six years or more? A. Well, as I say, to start with, if we could have accomplished these two things simultaneously, it would all have been together and been for the benefit of the bondholders and the C. D. holders. Now, to abandon this plan at this time means that the Committee may have to carry on for an additional six years. Today, those thirty per cent of the bondholders who have no interest in the Ambassador, have either the right to take eight dollars a share and get out of it entirely, or continue along and ultimately take their chances of getting their twelve dollars a share, and I think it would be very bad to continue that that way.

Q. There is a possibility that at the end of six years they might not be able to get anything? A. Might not be able to get anything, and I think the control of the Amusement Company should be lodged exactly where the control of the Ambassador Building is, and that is with the trustees."

And right here it might not be out of place to suggest that under the Scherck Richter proposal everyone is compelled to stay in the picture and take the chance at the end of four, five or six years or longer of not getting anything.

THE DUAL POSITION OF MR. DYSART.

The record does not disclose that there was ever any suggestion even of any objection on this ground urged by the Petitioner in the District Court.

The record discloses that Mr. Dysart's part in the negotiation leading up to the contract was limited to representing the Bondholders' Committee. The Ambassador Building Corporation and its bondholders were represented by a special committee consisting, as stated, of Messrs. Farrington, Morse and Baer (R. pp. 122, 123, 128, 132, 143). The Committee took the position that, while it should take care

that the bondholders should receive fair treatment, it was its duty to see to it that those depositors who no longer had any interest in the Ambassador Building Corporation or any of its securities should receive a sufficient amount of cash, if they wanted it, to compensate them for the sale of their interest in other assets owned by the Bondholders' Committee (R. pp. 127, 128). The contract provided that it was not binding unless approved by the court (R. p. 33). The holders of Certificates of Deposit were expressly advised that Mr. Dysart was president and a director of the Ambassador Building Corporation (R. p. 46). But Mr. Dysart, according to the Record, did not himself own a single share of stock or any bonds of Ambassador Building Corporation (R. 143).

Such was the evidence. On that evidence the District Court approved the proposed contract between the Ambassador Building Corporation and the Committee, and the United States Circuit Court of Appeals for the Eighth Circuit affirmed that approval (123 Fed. [2] 364).

Scherck, Richter Company now petitions this Honorable Court for a writ of certiorari directed to the United States Circuit Court of Appeals. Respondents respectfully urge that this petition should be denied for the following reasons:

REASONS FOR DENIAL OF PETITION.

I.

(a) Writs of certiorari are granted only "in cases of peculiar gravity and of special importance and in order to secure uniformity of decision." We have no such case here.

Hamilton-Brown Shoe Company v. Wolf Bros., 240 U. S. 251.

(b) This case does not fall within the rule of this Honorable Court governing the issuance of such a writ for the reason that the decision of the Eighth Circuit Court of Appeals (1) is not in conflict with any decision of any other Circuit Court of Appeals on the same matter, (2) does not decide any important question of local law in a way probably in conflict with applicable local decisions, (3) does not decide any important question of Federal law which has not been, but should be, settled by this Honorable Court, (4) does not decide any Federal question in any way probably in conflict with applicable decisions of this Honorable Court, and (5) has not so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such a departure by a lower court as to call for an exercise of this court's supervision.

Rule 38, Section 5, of the Rules of the Supreme Court of the United States.

II.

(a) The decision of the United States Circuit Court of Appeals is not in conflict with what is known as the Absolute Priority Rule announced by the decisions of this Court, cited under Point IV (1) and (2) of Petitioner's petition.

(b) The United States Circuit Court of Appeals expressly recognizes that rule and the cases cited by Petitioner, saying:

> "It is true that the Certificate of Deposit Holders are entitled, as against the other interests, to full participation, exclusive as against the others, in the assets available until they are made whole."

The Circuit Court of Appeals then finds, as a matter of fact, that no substantial property right is being taken from the Certificate of Deposit Holders, saying (R. p. 220):

"The important question is whether property rights of substantial value and substance are being invaded rather than an abstract question of control and management. As has already been observed, appellant conceded in the lower court that $8 per unit for each certificate holder who had sold its bonds is a fair price, and appellant has sold its bonds. The lower court found that $12 was a fair consideration for the preferred stock, and the evidence sustains that finding. We think that no substantial property right is being taken from the Certificate Holders, as such, by the Plan approved."

(c) This finding of fact of the District Court and the Circuit Court of Appeals "shall not be set aside unless clearly erroneous."

Rule 52, Rules of Civil Procedure.

(d) The Petitioner, having expressly stated in the District Court that it did not question the adequacy of the price of $8 per $100 for his certificate of deposit holdings, should not be heard to question it here.

Panama City v. Federal Reserve Bank of Atlanta, 97 Fed. (2) 499;
United States Shipping Board Emergency Fleet Corp. v. S. Atlantic Dry Dock Corporation, 19 Fed. (2) 489.

(e) But, even if Petitioner were permitted to raise that question here, the evidence which we have set out in our statement is conclusive that this price is more than adequate.

III.

The cases cited in Petitioner's Petition, Point IV (1) and (2) are cases involving the inclusion of stockholders in plans where they had no equity and where creditors were

not paid in full. We have no fault to find with the principles announced in them. They have no application here as under the evidence the value of Petitioner's Certificates of Deposit is $6.40 per $100 face value, and one class of the holders of these Certificates of Deposit is being paid $8 for each $100 of face value thereof—and this includes the Petitioner—and the other class is being paid $12 in liquidating preferred stock and other valuable rights by way of additional advantages to their holdings of Ambassador Building Corporation securities—a clearly adequate consideration.

Nothing then is being taken from the Petitioner. It is receiving the full value in cash of its holdings. It has no other interest in this proceeding than as a Certificate of Deposit Holder. There is nothing here of which it should be heard to complain.

IV.

The question presented to the District Court and to the United States Circuit Court of Appeals—whether the contract between the Bondholders' Committee and the Ambassador Building Corporation should be approved—was under the evidence clearly one of business policy and administrative, rather than judicial, in its nature, and its decision should not be disturbed unless it appears that the discretion was abused.

Warner Bros. v. Lawton-Byrne-Bruner etc. (8th Circuit), 79 Fed. (2) 804;
Mercantile Trust Co. v. Farmers Loan & Trust Co. (8th Circuit), 81 Fed. 254;
Central Trust Co. v. Continental Trust Co. (8th Circuit), 86 Fed. 517;
Reconstruction Finance Corp. v. Kentucky River C. Corp. (6th Circuit), 114 Fed. (2) 942.

V.

(a) Petitioner made no objection whatever in the District Court on the ground of any alleged dual capacity on the part of Mr. Dysart, and the Petitioner should not be heard here to do so.

See cases cited under II (d), supra.

(b) The record shows, however, that Mr. Dysart did not, in fact, act in a dual capacity in making the contract of sale between the Committee and the Ambassador Building Corporation.

(c) While any dual capacity on the part of Mr. Dysart might affect Mr. Dysart's right to compensation—and that is all that the cases cited by the Petitioner on this point hold—any dual capacity cannot make a contract which is otherwise fair and equitable unfair and inequitable.

ARGUMENT.

I.

QUESTIONS PRESENTED ACCORDING TO THE PETITION.

In its petition (page 10) Petitioner represents that four questions only are presented.

1. In the first question the Petitioner does not contend that the present sale is unfair or inequitable to Petitioner or to those Certificate of Deposit Holders in the same class with Petitioner. On the record, Petitioner could not well do so, as the record discloses that Petitioner admitted in the District Court that it was given the option of receiving the absolute full value of its interest.

In this question the Petitioner, however, concerns itself only with the 70 per cent of the Certificate of Deposit Holders who are in the other class and who, as holders of 70 per cent of the bonds of the Ambassador Building Corporation, are interested in having the control of the St. Louis Amusement Company placed with the Ambassador Building Corporation so as to give to that corporation a better opportunity of so operating the Ambassador Theatre as to be able to pay the Ambassador Building Corporation bonds held by the Certificate of Deposit Holders in this class, which bonds are now selling at only about 30. The approved sale is clearly in the interest of this class of Certificate of Deposit Holders.

First, under the terms of the sale this class of Certificate of Deposit Holders get the liquidating preferred stock of the new corporation, which takes over the assets of the Committee, on which they will receive $12 in cash from the new corporation—the full value of their interest in the assets held by the Committee, according to the record—

before any other person whatever can receive anything whatever.

Next, this class of Certificate of Deposit Holders are interested, as is clearly shown by the record, in seeing the Ambassador Building Corporation put in a position to be so operated, as stated, as to eventually be able to pay the Ambassador Building Corporation bonds. This position of the Ambassador Building Corporation would be greatly helped, according to the record, by having the Ambassador Building Corporation control the St. Louis Amusement Company, and would be accordingly hurt if that control were held by anyone else, particularly by Fanchon & Marco associated with Petitioner. These Certificate of Deposit Holders should not be deprived of that real benefit to them, as the owners of Ambassador Building Corporation bonds, merely because some other holder of Ambassador securities may incidentally, in the course of time, reap some small benefit from the sale. And, in this connection, we should again state in passing that it was always the intention of the Committee that this control of the St. Louis Amusement Company should be vested in the Ambassador Building Corporation.

With it the Ambassador Building Corporation can keep its present valuable lease of its theatre in effect, which otherwise it might lose.

And, outside of this benefit to the Ambassador Building Corporation arising from the control of the St. Louis Amusement Company—which will, as stated, redound to the benefit of this class of Certificate of Deposit Holders and in which other Ambassador bondholders may incidentally share—there is, according to Petitioner, little chance indeed of any other than those Certificate of Deposit Holders ever receiving anything substantial for at least a very long time, if at all. For instance, in its brief filed in the United States Circuit Court of Appeals (page

46), the Petitioner here, appellant there, says: "On the basis of present earnings and the requirement for principal payment on the indebtedness of the St. Louis Amusement Company, it will be impossible to make any payments on the liquidating stock for at least ten years. It will require from ten to fifteen years before this preferred stock can be fully liquidated." Petitioner would seem to blow hot and cold on this question. It argues at one time, as here, that the transaction gives something substantial to others than the Certificate of Deposit Holders, and at other times that the Certificate of Deposit Holders will not, themselves, be paid out for twenty-five years. And under the terms of the sale no one other than the Certificate of Deposit Holders can get anything whatever until the Certificate of Deposit Holders are paid out in full the value of the liquidating preferred stock.

Again, no Certificate of Deposit Holder of this class is objecting to the present sale. They, as did the District Court and the United States Circuit Court of Appeals, realize the real benefit to them of this sale regardless of the fact that some one else may incidentally receive some small benefit. It is true that one Certificate of Deposit Holder of this class, Healy, did file objections to both this sale and the offer of the Petitioner, but those objections are no longer pressed.

2. The next question suggested by Petitioner is whether the approved sale can be sustained as involving merely the determination of a matter of business policy by reason of the fact that 70 per cent of the deposited bondholders are also bondholders of the corporation which acquires the common stock in a new corporation to which the assets of the depositing bondholders are to be transferred. This question is, we submit, fully answered in our answer to Petitioner's question No. 1.

3. The third question suggested is whether the approved

sale can be sustained as fair and equitable when another plan is submitted to the Court which is free of the alleged inequalities of the plan of the Bondholders' Committee and which gives to depositing bondholders a better and more valuable security.

This question assumes that the Petitioner's offer gives to the Certificate of Deposit Holders a "better and more valuable security position." As to this, both the United States District Court and the United States Circuit Court of Appeals found, as a matter of fact, otherwise, and that finding of fact should not be disturbed unless clearly erroneous. In this connection it should be borne in mind that the Petitioner's offer, which it assumes to be more valuable than the approved sale, takes the control of the St. Louis Amusement Company away from the Ambassador Building Corporation and gives it to Petitioner's associates in the offer, Fanchon & Marco, where the record clearly shows such control might be most harmful to those Certificate of Deposit Holders who are also Ambassador Building Corporation bondholders and for whom Petitioner would seem to have so much concern.

In any event, we repeat, the Petitioner itself, the only remaining objector to the sale, receives in cash the full value of its interest in the securities held by the Committee.

4. The Petitioner next asks whether a court of equity, in approving the sale as having resulted from arm's length negotiations, can disregard the fact that the chief sponsor occupies a position of conflicting loyalties, in that he is Chairman of the Bondholders' Committee and also a voting trustee of the Ambassador Building Corporation, the corporation to which is given the common stock and complete voting control of the corporation which will acquire the assets of the depositing bondholders. As to this the record, as stated, clearly shows that Mr. Dysart

did not act in a dual or conflicting capacity in the negotiation of the approved contract, but that he acted solely as a member of the Bondholders' Committee and that the Ambassador Building Corporation was represented in those negotiations by a special committee of its Board of Directors, represented by separate and independent counsel. And, while the record does show, as stated, that Mr. Dysart was President of the Ambassador Building Corporation, which owns the common stock of the new company, and of the St. Louis Amusement Company also, the record further clearly and distinctly shows (R. p. 143) that Mr. Dysart did not in his own right own a single share of stock of the Ambassador Building Corporation or any of its bonds whatsoever, and that his connection with the Ambassador Building Corporation was as a member of the voting trustees, designated by the District Court, to vote the stock of the Ambassador Building Corporation in the interest of the Certificate of Deposit Holders as a part of the original plan of reorganization of the Central Properties, Inc.

Again, as to which more hereafter, the Petitioner in this question assumes that the conveyance to the Ambassador Building Corporation of the common stock of the new corporation is without consideration. On the other hand, the record clearly shows that this was not without consideration, but for full consideration.

A reference to the terms of the sale clearly indicates the consideration moving from the Ambassador Building Corporation. The Ambassador Building Corporation first cancels the debt of the Committee to it—the Committee, it will be recalled, having borrowed the money first from the Boatmen's National Bank and then the Ambassador Building Corporation with which it acquired the St. Louis Amusement Company stock; the Ambassador Building Corporation further agrees to pay certain other obliga-

tions of the Committee to purchase at $8.00 on the $100.00 the rights of the Petitioner and all of the Certificate of Deposit Holders in its class. In other words, the Ambassador Building Corporation obligates itself to furnish the money necessary to pay the Petitioner and those of its class the full value of their interest in the securities held by the Committee.

Again, as we have stated elsewhere, the Petitioner failed to even suggest any alleged dual capacity at the hearing on this matter in the United States District Court.

And even if it had made any such suggestion of such dual capacity, such alleged capacity could not make a sale unfair and inequitable if, as found by the District Court and by the United States Circuit Court of Appeals, it is fair and equitable. And, as hereafter stated, the only cases in this connection referred to by Petitioner have to do with compensation of one occupying a dual capacity and not with the fairness or unfairness of any transaction.

II.

(a) Petitioner having by its opening statement in the United States District Court, which we have set forth in our statement, clearly stated that it did not question the adequacy of the $8 per $100 for its Certificate of Deposit holdings, cannot be heard to do so now.

(b) And, in any event, under the evidence such price is clearly adequate.

(c) As stated, no contention or objection whatever was made on the ground of the dual capacity occupied by Mr. Dysart in the hearing below.

Nor has Petitioner cited any authority indicating that the fairness of the contract would be affected by any question of dual capacity. All of this dissertation upon any alleged dual capacity, it would seem, is solely in the

nature of a smoke screen to cover the weakness of Petitioner's actual position. The only cases to which Petitioner refers in this connection have to do only with compensation, and the court in one of those cases, in denying compensation because of conflicting interests which claimant represented, says:

> "It is unnecessary to say that fraud or unfairness were not shown to have resulted."

III.

The cases cited by Petitioner on the Absolute Priority Rule clearly have no application here. We are dealing only with a contract of sale. However, we will review them very briefly.

Case v. Los Angeles Company, 308 U. S. 106, involved only the "inclusion of stockholders in a plan where they had no equity and the finding that the plan was fair and equitable."

Price v. Spokane Silver & Lead Co., 97 Fed. (2) 237, is of the same character. It is true that the court in that case does say:

> "It is the duty of the court to scrutinize the plans of reorganization proposed for insolvent companies to make certain that the assets belonging to creditors are not by indirection diverted to stockholders."

And in the instant case, it is evident that the Trial Court did scrutinize the Committee's proposal and it was familiar with all the surrounding circumstances and facts and the equities of the parties, because it had the matter before it for some several years.

Sophian v. Congress Realty Co., 98 Fed. (2) 499, is a similar bankruptcy case.

St. Louis Union Trust Company v. Champion Shoe Machinery Company, 109 Fed. (2) 313, is somewhat different but likewise has no application here. In that case it appeared that there were two classes of bonds, one of which had been extended and the other had not been extended. The class which had not been extended had a prior lien. The plan, however, put both sets of bonds in one class, although, as a result, the bonds having a superior lien would not be paid in full. And the court merely says:

> "The record shows that the bonds of the appellants and of others in their situation and the bonds of those who never consented to any extension were fully secured by the assets pledged; that other bonds evidently were not; that under the plan of reorganization, which made no distinction between bondholders, the appellants and the others whose rights are superior to those of other bondholders will not receive the worth of their bonds. The plan which compels them to surrender, without adequate consideration and for the benefit of other bondholders, the superior rights which they acquired is inequitable and unfair."

We, of course, have no such situation here, for in the instant case the Certificate of Deposit Holders, who are in the same class with Petitioner, and the Petitioner, who are asked to surrender their rights, are being paid adequate consideration for their rights in that they are to receive $8 per $100 of face value of Certificates of Deposit, which all the evidence shows to be a fair value of the assets represented by the Certificates of Deposit, and as to which Petitioner expressly stated in the court below that he made no controversy.

The case of Consolidated Rock Company v. duBois, 312 U. S. 510, is the same character as the foregoing.

IV.

The District Court, when this matter came on to be heard before it, found a committee, over which it had retained jurisdiction, holding assets, just as a receiver does, belonging to the holders of Certificates of Deposit. The Court was asked by the Committee to approve a contract of sale for those securities for part cash and part securities. The only objector is one which is entitled under the contract to take its purchase price in cash, in an admittedly adequate amount. The question thus presented to the court below was one of administrative and business policy rather than one of law, and the decision of that court should not be disturbed unless it can be said that the court's discretion was clearly abused, to support which latter there is absolutely nothing in the record. See cases cited on this point, supra.

V.

In conclusion, just a few comments on the general picture, on the Ambassador contract, and the Scherck, Richter proposal.

(a) It cannot be too strongly emphasized that the ultimate effect of the transaction which the court below approved is to carry out the original purpose and intent which the Committee had in mind when in 1936 it acquired at the bankruptcy sale the assets of Skouras Bros. Enterprises, consisting primarily of 52 per cent of the capital stock of St. Louis Amusement Company. That purpose and intent was to protect the interests, primarily, of the holders of the bonds of the Ambassador Building Corporation which had been issued pursuant to the original plan of reorganization approved by this court, and, secondarily, of the holders of the stock of Ambassador Building Corporation.

There would seem to be no ground for dispute about the fact that both the Committee and the Ambassador

Building Corporation have always and do now consider the control of this stock of the St. Louis Amusement Company absolutely essential to the protection of the bondholders and stockholders of Ambassador Building Corporation. Thus the Committee in its report, filed in the cause below in 1937, in referring to this matter, stated to the court that "the studies and investigations made by the Committee and its counsel of the moving picture theater business convinced them that such a result was not only desirable, but necessary," and later on in said report the Committee said "the Committee concluded * * * that a sale of the bankrupt's St. Louis Amusement Company stock, which would give the purchaser control of the St. Louis Amusement Company * * * would ultimately adversely affect the interests of the holders of Certificates of Deposit for Central Properties Corporation First Mortgage Bonds." Mr. Dysart, Chairman of the Committee, testified that if the Ambassador Building Corporation should lose control of the 52 per cent of stock of St. Louis Amusement Company it would be very detrimental to the Ambassador Building Corporation; that if the St. Louis Amusement Company stock could have been acquired simultaneously with the acquisition of the Ambassador Building, such stock would have been turned over to the Ambassador Building Corporation as a part of the plan of reorganization; that the St. Louis Amusement Company stock should be placed under the control of the same Voting Trustees for the Ambassador Building Corporation who were theretofore appointed or approved by the court below; and unqualifiedly recommended the proposed transaction for approval by the court, having in mind all of the terms and provisions of the Scherck, Richter proposal and the various objections which had been presented to the court.

Mr. Turley also testified that it was not only desirable that control of the 52 per cent of the stock of St. Louis Amusement Company be in the hands of the Ambassador

Building Corporation and that it was very important that the lease of the Ambassador Theatre to Fanchon & Marco be kept in effect, but that it would be detrimental to the Ambassador Building if control of that stock should pass to any competitor of the Ambassador Theatre. This testimony of Mr. Dysart and Mr. Turley was uncontradicted, and its correctness is not challenged by the Petitioner.

(b) The problem presented as to the 25-30 per cent of Certificate of Deposit Holders who have disposed of their Ambassador Building Corporation bonds and stocks.

Since the object and effect of the transaction approved by the court below is to carry out the original purpose and intent of the Committee in acquiring the controlling stock of St. Louis Amusement Company, the only real question with which the court was confronted or which is now presented to the court is, whether or not the interests of these 25-30 per cent of holders of Certificates of Deposit, who have sold their Ambassador Building Corporation bonds, are being adequately protected. In this connection it is significant that no complaint was made in the court below by Petitioner as to the adequacy or inadequacy of the protection of the holders of Certificates of Deposit. Counsel for Petitioner expressly stated that they did not raise any question as to the adequacy or inadequacy of the payment of $8 per share. It is true that Petitioner came into court as the holder of Certificates of Deposit originally issued for $11,400 par value of bonds, but making no complaint on this ground. Instead, the position of the Petitioner would seem to be essentially that of an investment banker submitting a proposal to purchase certain assets upon terms which it believes will be profitable to it and, incidentally, but only incidentally, may be profitable to the holders of the 25-30 per cent of Certificates of Deposit no longer having any interest in the Ambassador Building.

Again, while no complaint was made below by Petitioner with respect to the adequacy of the provision for a cash payment of $8 per share at the option of the holders of said 25-30 per cent of holders of Certificates of Deposit, nevertheless, it may be well to review briefly the uncontradicted testimony as to such value. The assets, aside from the St. Louis Amusement Company stock, West End Lyric notes, and the second mortgage notes of St. Louis Amusement Company, are of nominal value. On the basis of the average annual earnings of the St. Louis Amusement Company for the past five years, said stock is worth $242,950, or the equivalent of $6.40 for each certificate initially representing the deposit of a $100 bond. The price paid by the Committee at the bankruptcy sale produced for the non-depositing bondholders a little less than $6.50 per $100 bond. With the outstanding option and management contract to Fanchon & Marco, an independent exhibitor would not be likely to be interested in making a bid for the stock.

In addition to the fact that none of the holders of said 25-30 per cent of Certificates of Deposit made any complaint in the lower court as to the adequacy of the provision made for such Certificate of Deposit Holders, it seems clear from the uncontradicted testimony as to value that none of such Certificate of Deposit Holders could properly complain of the proposed plan which provides, as stated, that each of said Holders of Certificates of Deposit may, at his option, take $8 per $100 in cash or $12 per $100 in stock.

(c) No Problem as to the Remaining Certificate of Deposit Holders.

Now there is no problem before this Court with reference to the remaining Certificate of Deposit Holders, for none of them are objecting to the present sale, and we have shown, supra, how same benefits them.

(d) The Objections of Petitioner would seem to be based solely upon the proposition that the offer of Petitioner is better than the one presented by the Committee and the Ambassador Building Corporation. Three reasons are offered for this contention. First—that the Certificate of Deposit Holders would receive preferred stock having a par value of $15 instead of $12; Second—that there would be more equity behind the preferred stock that they will receive; and, Third—that a revised Fanchon & Marco management contract might be more advantageous.

It is perfectly true that the Scherck, Richter offer provides for $15 par value stock rather than $12 par value stock, but under that plan the stockholders would have a permanent investment in preferred stock upon which the most they might reasonably hope to receive would be dividends of 5 per cent, whereas under the sale approved the Certificate of Deposit Holders should ultimately receive $12 in cash for each share of stock. Furthermore—and here is the real objection to the Scherck, Richter offer—it makes no provision for the payment in cash of those Certificate of Deposit Holders who have sold their Ambassador Building Corporation bonds and will keep them in the position of having a permanent investment in an enterprise in which they have no other interest, with the risk attendant thereto. Perhaps no better argument can be made in this connection than to again quote the testimony of Mr. Dysart with reference to the objection to the Scherck, Richter plan:

> "Q. And having in mind all of the terms and provisions of the Scherck, Richter plan and the various objections which have been presented to the Court? A. I think it is much better than the Scherck, Richter plan.
>
> Q. Mr. Dysart, will you state specifically—you gave one reason, I believe, why you thought this plan of the Committee was better than the Scherck, Richter

plan. Are there any other reasons why you favor the Committee's plan? A. There are three reasons—three objections that I, as a member of the Committee, have to the Scherck, Richter plan, whether this other plan was under consideration or not. One is, they make no provision to give the thirty per cent. C. D. holders, who are no longer interested in Ambassador Building Corporation, they give them no opportunity to get out for cash and call it a day. That is one reason. Another reason is that the Scherck, Richter plan, if it were accepted, or if the Committee should sell to the Scherck, Richter people, that would immediately enable Fanchon and Marco to cancel their lease of the Ambassador Theatre, which would be detrimental to the Ambassador bondholders. Now, the third, and in my opinion the most important, objection is that for a mere promise to pay an additional three dollars in preferred stock, they take the control of the Amusement Company absolute, absolutely take it out of the hands of those who should continue to control it until the bondholders have been paid.

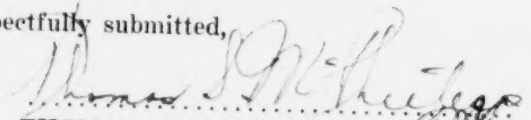
Q. And that, of course, means that it takes the control out of the hands of the trustees who have heretofore been appointed by this court, or approved by this court? A. That is right. Gives them nothing but a preferred stock, which has no priority, no definite assurance of payment."

(e) It is suggested that under the Ambassador contract those persons who had purchased Ambassador Building Corporation bonds and those persons who had acquired certain of the Ambassador Building Corporation stock may benefit in that they may participate to a certain extent in the benefits, if any, of this contract. The first answer to this is that Petitioner is not in a position to complain of this fact, in view of the fact that the Petitioner is being offered the full and adequate value of his Certificate of Deposit holdings. Again, it should be borne in mind that, except for the indirect benefit and protection to the Am-

bassador Theatre afforded by the control of the St. Louis Amusement Company, there is no possibility of such other parties participating in the benefits or earnings from the St. Louis Amusement Company stock until the preferred stock of the aggregate par face value of $438,684 has been paid in full and retired, and the income bonds now outstanding in the principal amount of $3,468,200 have been paid in full and retired. It is only then that the stockholders of Ambassador Building Corporation will be entitled to participate in the earnings of the 52 per cent controlling stock of St. Louis Amusement Company. Surely, this remote possibility of the stockholders of Ambassador Building Corporation participating in the earnings from the St. Louis Amusement Company stock is justified by the fact that the money of the Ambassador Building Corporation, in which its bondholders and stockholders now have an interest, is being used to carry out this contract; it is only proper that such stockholders should receive some possibility of benefit therefrom, however remote.

In conclusion, we respectfully submit that the Ambassador contract is fair and equitable, and that the Petitioner is not in a position on the record here to complain, and that the petition here should be denied.

Respectfully submitted,



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